

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 016274-03

Sherry L. Sanchez
M.B.T.A.
M.B.T.A.

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Horan)

APPEARANCES

Nancy L. Hall, Esq., for the employee
Alyson R. Haley, Esq., for the self-insurer at hearing
Mark A. Teehan, Esq., for the self-insurer on appeal

CARROLL, J. This appeal presents the question of whether an employee's ordinary days off should be considered in determining initial entitlement to weekly workers' compensation benefits. The judge concluded that the employee had not established a personal injury under G. L. c. 152, § 29.¹ His reasoning was that, although the employee had arguably been incapacitated for seven days due to a work injury, the last two days of the week were days on which the employee normally would not have worked. The judge therefore concluded that the employee could not be found to have lost any compensable time from her employment due to her alleged work injury. With regard to this issue, we agree with the employee that the decision is contrary to law.

¹ General Laws c. 152, § 29, provides, in pertinent part:

No compensation pursuant to thirty-four or thirty-five shall be paid for any injury which does not incapacitate the employee from earning full wages for a period of five or more calendar days. If incapacity extends for a period of twenty-one days or more, compensation shall be paid from the date of onset of incapacity. If incapacity extends for a period of at least five but less than twenty-one days, compensation shall be paid from the sixth day of incapacity.

The facts are straightforward. The employee began to notice problems with her left thumb in February 2003, which she experienced while performing her office duties for the employer, the M.B.T.A. Her treating physician diagnosed a CMC joint instability and recommended surgery. The self-insurer denied liability for the condition, and refused to pay for the proposed treatment. (Dec. 5.) The employee continued to work, but was allowed to restrict her typing as per her doctor's recommendation. (Dec. 6.) The employee was out of work for one week, from October 20-27, 2003, due to her thumb joint problem. (Dec. 7.)

The employee claimed medical benefits for the proposed surgery, and incapacity benefits for the one week she was out from work. The self-insurer continued to deny liability for the condition. (Dec. 2.) The employee was examined by an impartial physician, who opined that the proposed surgery for the employee's CMC joint synovitis, with instability, was appropriate. The doctor did not causally relate the condition to the employee's work, instead attributing it to mild early osteoarthritic changes. The judge adopted the impartial physician's opinion and denied the employee's claim for medical benefits. (Dec. 6.)

The judge allowed the parties to introduce additional medical evidence to address extent of disability and causal relationship on the employee's claim for incapacity benefits for the period of October 20-27, 2003. (Dec. 4.) The employee submitted records of her treating physician, Dr. Alan Ertel. (Dec. 1.) However, the judge disposed of the employee's claim prior to addressing the medical evidence:

In retrospect, such [additional medical] evidence was unnecessary. According to the M.B.T.A. Statement Of Claim For Sick Leave Allowance, part of Employee's Exhibit 3, the employee was out of work beginning October 20, 2003 and returned to work on October 27, 2003. I take judicial notice of the calendar indicating that October 20, 2003 was a Monday. According to the Statement Of Claim For Sick Leave Allowance, Ms. Sanchez worked five days a week, Monday through Friday, with weekends off. During the week beginning Monday, October 20, 2003 Ms. Sanchez missed work on Monday [through] Friday. Saturday and Sunday were her regular days off. Thus, she missed five days of work before returning to

work the next Monday, October 27, 2003. She has missed no other time from her job.

...

All other issues aside, the provisions of § 29 preclude an award of § 34 or § 35 benefits to an employee who has not been incapacitated for at least six days. Since Ms. Sanchez was out of work for only five days in October, 2003, she is not entitled to weekly benefits during this period.

(Dec. 7-8.)

Certainly, workers' compensation is primarily a system of wage-loss replacement for employees suffering injuries within the meaning of the act. See McDonough's Case, 440 Mass. 603, 604-605 (2003) and cases cited. However, the judge's construction of § 29 takes the wage-loss replacement precept of G. L. c. 152 too far. The law is clear that an employee is paid incapacity benefits for loss of earning *capacity*, of which actual earnings are only one standard of measure. "In general, the purpose of the Massachusetts Workers' Compensation Act is to compensate an injured employee for the impairment of his earning capacity." Vouniseas's Case, 3 Mass. App. Ct. 133, 134 n.3 (1975). Earning capacity is not the same as earnings. G. L. c. 152, § 35D, makes this point ineluctable, given its directives for establishing earning capacity:

For the purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the *greatest* of the following:--

(1) The actual earnings of the employee during each week.

...

(4) The earnings that the employee is capable of earning.

(Emphasis added.) See also McDonough v. Boston Edison Co., 18 Mass. Workers' Comp. Rep. 112 (2004)(remand decision, applying minimum compensation rate under § 31 to death benefits where no earnings on which to base average weekly wage as of date of death under § 35C).

We therefore conclude that the judge erred by denying the employee's claim of personal injury under the act, on the basis that she was not incapacitated for the sixth and seventh days of her claim, due to the happenstance of her normal work schedule. We reverse the decision in that regard, and recommit the case for the judge to make further findings on the employee's entitlement, if any, to workers' compensation benefits for those two days.² We summarily affirm the decision as to all other matters argued by the employee on appeal.

So ordered.

Martine Carroll
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **July 7, 2006**

² No compensation is paid for the first five days, unless incapacity extends for twenty-one days or more. See n.1 supra.